

FIGHTING FOR THEIR PLACE:  
CONSTITUTIONAL COURTS AS POLITICAL ACTORS.  
A REPLY TO HEINZ KLUG

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## 1 Introduction

‘For the Court, the greatest threat is that it is ignored.’ Towards the end of his essay on the 2009 term of the South African Constitutional Court, Heinz Klug offers this incisive maxim about what should concern any court in charge of the onerous task of constitutional review. It suggests something constitutional theorists have tended to neglect: constitutional courts, both in less and in more consolidated democratic regimes, need to be vigilant about the dormant threats of non-compliance that often lurk behind intrusive judicial decisions directed against other major political actors.

This brute ingredient of *realpolitik*, Klug seems to agree, needs to be factored into any accurate description of, or plausible prescription about, the role of constitutional courts. Klug envisions the 2009 term in the light of the Constitutional Court’s continuing attempt to, in his words, ‘find its place’ within this ‘young and turbulent’ political system.

Klug’s essay could be approached from various different and equally fruitful angles. The representativeness of the cases selected, the soundness of their categorisation, the accuracy of the description of each case and how it fits into the general jurisprudence of the Constitutional Court are questions that deserve to be discussed with care. As a curious outsider, however, I shall not pursue any of these

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paths. Instead, I would like to engage with Klug's ambitious attempt to address, through the analysis of these decisions, the broader theoretical question of the relationship between law and politics in South African constitutional adjudication. This short reply also proceeds through three additional topics: the second sketches some ways in which constitutional adjudication has traditionally been regarded as 'political'; the third describes Klug's conceptual apparatus and how he tries to use it to navigate through the Court's jurisprudence; and the fourth probes the soundness of Klug's conclusions and claims that, however pertinent his analysis of the cases might be, it still falls short of fulfilling his initial purposes.

## **2 Constitutional courts and the fuzzy line between law and politics**

Ordinary and academic legal discourses have distinguished law and politics in a variety of ways. When it comes to constitutional review of legislation, the grey zone between these two concepts appears to get even more pronounced. For the purpose of this reply, it is useful to start by identifying how judicial decisions, especially those originating in the context of constitutional review, are referred to as 'political' as opposed to 'legal' or the like. This preliminary frame may help to put Klug's approach in perspective, or so I hope.

First, constitutional courts are seen as political by virtue of their inherent function, beyond resolving particular legal disputes, in shaping the boundaries of the political, that is, their function in defining, in conjunction with the other branches, the way a constitution should be understood. By speaking on behalf of and towards all the members of the political community, constitutional courts help to define their community's very political identity. On this approach, in other words, a constitutional court is political because it participates in the complex process of law-making that springs from the constantly shifting division of labour between the branches within the separation of powers.

Secondly, thanks to the typically thin and malleable character of constitutional norms, constitutional review may also be discerned as political for its discretionary character. The constitutional text invites moral and ideological quarrels about the application of abstract concepts and places the court in the midst of such controversies. On this view, since constitutional norms often do not command a clear solution to the cases that come before the court, judges cannot help but decide on the basis of their political convictions. It is such convictions, rather than law strictly conceived, that determines their decision.

Thirdly, a court may be perceived as political because it must perforce respond to the political constraints that surround each decision, calculate the impact of its decisions, and anticipate the likely reactions of other political actors, which may jeopardise its effectiveness. A court, thus conceived, intuits the feasibility of its actions according to a necessarily speculative and premonitory calibration. It is, in this sense, strategic.

These three senses – the court as polity framer, as discretionary actor and as strategic political actor – should be kept in mind when examining Klug’s essay. Indeed, the list could be extended even further. Apart from these three preliminary senses, constitutional courts may be regarded as political if they reflect partisan cleavages; if they become, even if not partisan allies, policy-oriented rather than principle-oriented agents; and, finally, if the judges form coalitions within the multi-member body and behave in a strategic rather than collegial way. These latter meanings are less important for current purposes, however, and thus I shall concentrate on the three preliminary ones.

### **3 The dualities of constitutional adjudication**

Klug structures his account around a series of seemingly synonymous dualities: law versus politics; principle versus institutional pragmatism; internal versus external dimensions; and, finally, formalistic or plain meaning versus purposive, contextual or consequentialist methods of constitutional interpretation. This series of dichotomies is invoked to describe how the South African Constitutional Court has endeavoured to ‘find its place’ in the constitutional regime. The text does not provide a fully fleshed-out definition of what these concepts mean, but some passages may help us to hypothesise. I shall try first to reconstruct the way Klug presents his conceptual apparatus and then examine how he applies it to the case analysis.

The introduction to the essay advances what is supposed to be its guiding analytical drive: The South African Constitutional Court, for Klug, has avoided both the danger of becoming an arena of pure political contestation and also of indulging in the exercise of interpreting, in his words, the ‘utopian’ declaration of rights without attention to the background conditions in which these rights are being applied. Moreover, the Court has accomplished this by, in his words, exploring ‘the interaction between principled argument and institutional pragmatism’ and by managing ‘the tension between the internal and the external dimensions of its role’. Despite constantly being placed on this knife’s edge, the Court has survived.

Klug then claims that the recent literature on courts, if valuable for highlighting relevant aspects of constitutional adjudication and principled reasoning, does not fully recognise ‘the institutional concerns that may be an animating factor of the Court’. Although he does not address what these concerns might actually be, and does not answer why such concerns cannot be accommodated by principled reasoning itself, he offers some hints. For example, he immediately connects this claim to a statement made by Justice Albie Sachs in his recently-published judicial memoirs. Sachs explains that the ‘confidentiality of the collegial enterprise’ unfortunately impeded him from disclosing what actually went on ‘around the conference table’. Klug uses this statement to conjecture that, although many of these confidential debates must have been about ‘issues of interpretation’, they surely also involved questions about the Court’s ‘place as an institution within the constitutional and political system’.

Klug further proposes that the distinction between principle and pragmatism maps onto the internal and external dimensions of a constitutional court which, in turn, corresponds to the ‘effort to maintain internal consistency within legal doctrine’ and the Court’s concern with its ‘institutional place’. By wearing these ‘bifocal’ lenses, the observer may be able, not just to read and assess the reasoning of the Court’s decisions, but also to perceive how the Court, at the same time, positions itself *vis-à-vis* the other branches. Or in Klug’s words: ‘We might be able to view this set as a circumscribed frame within which to explore both the internal life of the Court’s reasoning as well as the external and institutional influences with which these decisions are infused.’

At the end of the introduction, Klug elaborates on this internal versus external contrast a bit more. He asserts that, while the former aspect relates to the persuasiveness of the Court’s opinions, ‘at the same time the judgments of the Constitutional Court are characterised as bold or pragmatic, as exhibiting a willingness to challenge the government or as executive minded, revealing from this perspective a clearly “external” or “institutional” dimension’. He concludes with an ambitious methodological mission:

This paper explores the Court’s legal opinions within a pre-defined set of decisions as a way to focus on the interaction between the ‘internal’ and ‘external’ dimensions of the Court’s work – hoping to develop a more theoretically satisfying understanding of the relationship between law and politics within the Constitutional Court’s jurisprudence.

The terminology so far used is not entirely unfamiliar to the constitutional scholar. The way Klug conceptualises it, moreover, despite remaining slightly vague, suggests that a constitutional court is influenced by a bipolar tension that comprises, on one side of the

scale, the conventional demands of legal reasoning, with all its rational burdens and constraints, and, on the other side, an extra-legal aspect. This second aspect, however, remains quite equivocal. Taking stock of these passages, one could plausibly claim that it probably corresponds at least to one of the three senses through which adjudication is deemed 'political', as described in the previous section. Each sense, however, has distinct methodological implications for the analysis of the relation between law and politics. It is crucial, therefore, to inquire into Klug's analysis to find out which sense he is using.

Klug examines three sets of cases (related to political rights, social rights and institutional concerns) that help the reader to grasp what he has in mind. In *AParty*,<sup>1</sup> for example, Justice Ngcobo's decision evidenced, for Klug, the interaction between the internal and external dimensions of the Court's jurisprudence by balancing the constitutional right to vote against the broader political and institutional context of the case.

When comparing Justice Yacoob's position to that of the majority in the *Abahlali* case,<sup>2</sup> Klug seems to suggest that the internal dimension is somehow connected to a formalistic take on constitutional interpretation. By formalistic, in turn, he means a concern with the plain meaning of words, whereas an approach oriented to the external dimension, again, would take cognisance of the broader context. He affirms: 'Justice Yacoob is clearly calling for an "internal" reading of the law and the Court's jurisprudence and criticises his colleagues for looking outside and beyond the words.' An external understanding, on the contrary, would be more purposive. In Klug's words: 'In contrast to this "internal" orientation, the majority invokes an "external" understanding by recognising the purpose of this legislation.' He highlights Justice Moseneke's stance that the Court must 'give legislation a purposive and contextual interpretation', an approach through which the Court considers not only the 'internal language of jurisprudence but also the consequences of the law in action'.

Klug also examines a few other cases, but the crux of his analytical repertoire does not significantly change. In sum, the distinction between internal and external revamps an old dichotomy about methods of interpretation. In the literature on constitutional interpretation, there is a proliferation of adjectives to characterise these dualities: while one method is formalistic and textualist, the other is contextual, purposive, consequentialist or sociological; while

<sup>1</sup> *The AParty & Others v Minister for Home Affairs & Others* [2009] ZACC 4.

<sup>2</sup> *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* (CCT12/09) [2009] ZACC 31; 2010 2 BCLR 99 (CC).

one is concerned with the 'law in the books', the other tries to reconcile it with 'law in action'. The internal and external dimensions, as defined by Klug, rather than two analytical prisms that co-exist in each case or two standpoints from which to observe the Court, boil down to two relatively exclusive interpretive approaches - the Constitutional Court, in each case, adopts either one or the other (it is either formalistic, hence internal-oriented, or purposive, hence external-oriented).

This dichotomy certainly provides a possible lens through which to read and describe the written decisions of the South African Constitutional Court. As far as the relation between law and politics is concerned, however, it does not reveal enough. Or so I shall argue below.

#### **4 Between public reasons and political instinct**

Constitutional review galvanises multiple social forces. It is not, therefore, safe from the rule of actions and reactions in politics. Explanatory stories for the expanding space occupied by constitutional courts in contemporary democratic regimes are not exhausted by the constitutional text, judicial written decisions, judicial ideologies, or methods of interpretation. They rely a great deal on the circumstances that enabled each court to seize new attributions or which frustrated their institutional ambitions and forced them to step back.<sup>3</sup>

Political actors do not usually perceive a constitutional court as an inoffensive agent.<sup>4</sup> Courts may be a strategic ally to be co-opted or, sometimes, an obstacle to be ousted. Resistance against unwelcome judicial decisions comes in various shapes, some of which lie outside institutional procedures and arenas. Constitutional courts may face, in some circumstances, strong challenges to the effectiveness of their decisions. Successful management of these challenges goes beyond legal interpretation. It depends upon political dexterity.

The court, to some extent, must rely on its own instincts to anticipate backlashes and to measure its ability to keep them under control. Put straightforwardly, it must be a tactician. The constraints of politics comprise a set of more or less unavoidable non-legal decisions the court needs to make. These are choices that,

<sup>3</sup> There are several explanatory hypotheses for the process of judicialisation of politics that has taken place in the last few decades. See, eg, M Shapiro & A Stone-Sweet *On law, politics and judicialisation* (2002).

<sup>4</sup> This is an empirical statement that applies, to varying degrees, in most contemporary democracies. See G Vanberg *The politics of constitutional review in Germany* (2005).

undoubtedly, lie beyond the four corners of the law. It is the space, indeed, for pragmatic and consequentialist considerations. Such constraints transcend formal doctrine and can only be captured by a different sort of lens.

Constitutional courts do not operate in a political vacuum. This oft-repeated truism, if not much heard from legal scholars, has important implications. As a condition of intelligent and effective decision-making, if not of institutional survival itself, courts need to be perceptive and reactive to the surrounding political climate.<sup>5</sup> Constitutional decisions may face resistance and cannot but rely on the allegiance of political partners to be enforced. A court that is insensitive towards this fact is less capable of carrying out its constitutional mandate. It must avoid, therefore, impolitic moves that erode its reservoir of authority and legitimacy. Indeed, the attempt to be anti-political may undermine its very political viability.

Courts, therefore, do not only pursue correct decisions from the standpoint of law. Political survival is also a primary pragmatic concern. The court has to guess the consequences of its decisions in a zone of profound uncertainty. The faculty of political foresight has to be integrated into its decisional arsenal. This can be better translated as the 'esoteric morality' behind constitutional decision making.<sup>6</sup> Esoteric morality comprises considerations that cannot be publicly unveiled. Courts may play with several political cards, but political success largely depends on keeping these choices secret, under pain of being delegitimised or defeated. At least some of them, thus, should remain inscrutable. What exactly should remain esoteric will, to some extent, depend on how the court is perceived by the political culture and how trusted it is to play certain kinds of roles.

This does not mean, however, that observers cannot engage in critical debate about political choices that, on their face, courts are taking. The mode of debate, in this case, is not shaped by or accessible through public reasons. It is not possible to entertain a frank dialogue with the court about its strategic choices if these

<sup>5</sup> This is a common premise in studies of the politics of adjudication, an empirical truth with which normative theories still need to come to terms. Ferejohn echoes this shared point of departure: 'I am assuming that courts will tend to exercise their authority within political constraints. That is, they will not adopt courses of action that lead to regular and repeated reversals or other sharp reactions by the political branches.' J Ferejohn 'Judicialising politics, politicising law' (2002) 65 *Law and Contemporary Problems* 59.

<sup>6</sup> Singer & Lazari-Radek have recently made a case for esoteric morality as a partial commitment of consequentialism in the domain of personal ethics. The basic proposition of esoteric morality is: 'It may be right to do and privately recommend, under certain circumstances, what it *would not be right to advocate openly.*' P Singer & K Lazari-Radek 'Secrecy in consequentialism: A defence of esoteric morality' (2010) 23 *Ratio* 37.

choices are not openly articulated. Because consequences are at stake, only history will tell what acts were politically wise. These choices can be judged retroactively, with hindsight.<sup>7</sup>

Not everyone accepts this approach. Thompson, for example, rejects the 'esotericism' of courts' political choices. He claims that political calculations should be open and that such publicity is the only way to promote judicial responsibility.<sup>8</sup> For him, 'citizens deserve to know when judges decide partly on the basis of such claims'. He does not deny that political calculation is sometimes an inevitable part of adjudication,<sup>9</sup> but calls for 'a more refined test of what should count as a principle in legal reasoning - one that rejects reasons that assert mere preferences or prejudices, but admits reasons that express relevant political factors'.<sup>10</sup>

The idea of a legal rationality that incorporates political judgment is a controversial one, the acceptability of which will vary from legal culture to legal culture. Whether plausible or not, however, it cannot go far enough. The reasons that ground some political choices cannot be publicised because their secrecy is the very source of their potential success. A court cannot declare: 'We will not go as far as we take the Constitution to require because we do not have enough political capital to enforce it.' Confessing its political weakness is an unwise way of constructing and managing its public reputation.

Political instinct is not a purely irrational act or, in Bickel's words, a 'craftsman's inarticulate feel'.<sup>11</sup> Empirical evidence about the level of public support the court enjoys and the historical record of the court's political interactions can help the court to gauge what

<sup>7</sup> For an example of this sort of speculative analysis of the political wisdom underlying the decisions of the South African Constitutional Court, see T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106-138. About the Chilean Constitutional Court, see J Couso 'The politics of judicial review in Chile in the era of democratic transition, 1990-2002' (2003) 10 *Democratisation* 4. About the Colombian Constitutional Court, see R Uprimny 'The constitutional court and control of presidential extraordinary powers in Colombia' (2003) 10 *Democratisation* 4. About the Indian Supreme Court, see PB Mehta 'The rise of judicial sovereignty' (2007) 18 *Democracy* 70-83.

<sup>8</sup> In respect of Justice Neely's assertion that he does not necessarily write in his decisions all the considerations that were necessary to decide, Thompson contends: 'Perhaps he calculated that voicing these political calculus would defeat his political purposes. But his political reasoning - at least as supplement to the constitutional and other arguments - may be a necessary part of justification.' D Thompson *Restoring responsibility: Ethics in government, business, and healthcare* (2004) 80.

<sup>9</sup> 'If the judicial norm of rationality is interpreted, as it usually is, to exclude political calculations of this kind, then the judicial process itself contributes to judicial irresponsibility ... The judge should either make the reasons public, or reconsider the decision itself' (Thompson (n 8 above) 80-81).

<sup>10</sup> Thompson (n 8 above) 80.

<sup>11</sup> A Bickel *The unpublished opinions of Mr Justice Brandeis* (1957) 30.



political choices are viable.<sup>12</sup> But this is not an issue that a court can engage in public.

A constitutional court needs, in sum, enough political ammunition to make itself respected. If that is not the case, it should back off, to an acceptable measure, from its ideal conclusions of principle. Such considerations do not only explain the successful political role played by the South African Constitutional Court,<sup>13</sup> but should inspire more realistic normative theory.

Klug's distinction between the internal and external dimensions of constitutional review could well map onto this dichotomy between esoteric instinct and exoteric public reasoning (and some of his sentences, to be fair, imply exactly this). If that was the case, however, his essay would need to include a richer contextual analysis of the jurisprudence. The interplay between the internal and external dimensions of the Court's work, thus understood, cannot be extracted purely from the Court's reasoning, as Klug tries to do. Instead, the two interpretive approaches outlined by Klug still fit within what we could broadly call the 'public reasoning' side of constitutional adjudication. Whether formalistic or contextual, both interpretive approaches are openly expressed in the written decisions of the Court. Underneath public reason, however, there is a political game that is played by strategic acts. It goes beyond hermeneutics, which is insufficient to grasp the fine line between law and politics. These two dimensions are not mutually exclusive. Neither does one necessarily colonise the other. It is a tension to be permanently administered by the Court.

Bickel perceived this tension astutely. He is usually celebrated for having posited the 'counter-majoritarian difficulty'. Some of his other

<sup>12</sup> Solum calls it practical wisdom: 'The practically wise judge has an intuitive sense of how real-life lawyers and parties will react to judicial decisions.' L Solum 'Virtue jurisprudence: A virtue-centred theory of judging' (2003) 34 *Metaphilosophy* 193; S Sherry 'Judges of character' (2003) 38 *Wake Forest Law Review* 797: 'Whether one calls it prudence, practical wisdom, practical reason, pragmatism, or situation-sense, in the end it comes down to an exercise of judgment.'

<sup>13</sup> Roux (n 7 above) considers that a mix of principle and pragmatism explains the record of this Court. In particular, he contrasts two groups of cases to show how the political circumstances either allowed the Court to follow principle or forced it to compromise. With respect to the former type of case, he describes how the Court managed to strike down the death penalty, against strong opposition from public opinion, thanks to an alliance with the government (*S v Makwanyane & Another* [1995] ZACC 3; 1995 3 SA 391) and to enforce the distribution of anti-retroviral drugs to pregnant women, despite strong government opposition, thanks to strong mobilisation of public opinion (*Minister of Health v Treatment Action Campaign (TAC)* 2002 5 SA 721). In the other set of cases, Roux finds plausible evidence to infer that, rather than making a 'mistake', in Dworkinian terms, the Court deliberately compromised on principle in order to safeguard its institutional security.

insights, however, remain underexplored. His argument on the 'Lincolnian tension', for example, is an important one. For Bickel, a constitutional court exists in the tension between principle and expediency, and needs to combine the provision of public reasons with a prudential posture towards the consequences that its decisions might produce.<sup>14</sup> The court's consideration of such consequences is different from adopting a consequentialist interpretive approach towards the law. Expediency, as opposed to principle, concerns a non-declared political hunch, a strategic move that cannot be publicly expressed under pain of losing ground in the political game. The court should be, at one and the same time, a 'public reasoner' and a 'political actor'. Both balls must be kept in the air. By reducing the court to one thing or the other, we miss part of the story.

The Constitutional Court of South Africa is certainly seeking, as Klug puts it, to find its place through the gradual elaboration of its doctrines of deference and the demarcation of its jurisdiction. The place of a constitutional court in a pluralist society that adopted a transformative constitution is likely to be under permanent contestation. Some elements of this contestation, nevertheless, cannot be exhausted by constitutional argumentation itself. Several non-legal choices have traditionally been exempted from a well-theorised duty of public accountability.<sup>15</sup> One of the current challenges of constitutional theory is to provide these categories (not only for explanatory but also for prescriptive and critical purposes). The behavioural patterns that can be investigated through these lenses may reach meaningful conclusions about the relation between law and politics.

Bickel's court is definitely not the South African Constitutional Court, as Klug himself acknowledges. Bickel's court is prudent in the particular sense of self-restraint, skilful in deciding modestly or even in not deciding. It prioritises the 'passive' rather than the 'active virtues'. His court is certainly not a promoter of social change. Such passivity does not characterise the decision-making record of the South African Constitutional Court, nor the record of many other courts that are charged with putting into practice transformative constitutions. Bickel's suggestion of the permanent tension between principle and expediency, however, summarises one kind of relation between law and politics from which we can analytically profit. By contrast, the distinction between 'internal' and 'external' dimensions

<sup>14</sup> A Bickel *The least dangerous branch* (1962) 66-69.

<sup>15</sup> There is virtually no room for such non-legal choices in a theory of constitutional adjudication such as the one outlined by Rawls, who conceives of the American Supreme Court as the 'exemplar of public reason' (J Rawls 'The idea of public reason revisited' (1997) 64 *The University of Chicago Law Review* 765) or the one deeply elaborated by R Dworkin *Law's empire* (1986).

proposed by Klug is still contained within the realm of hermeneutics. To this extent, it may be a useful tool for reading and classifying the Court's decisions. It also does a good job of characterising the nature of the Court's public reasons. It fails to grasp, however, the role of the Court as a political actor.

